Supreme Court, U.S.
FILED
961844 MAY 19 1997
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MMP INVESTMENTS, INC.,

Petitioner,

v.

LANDER CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve a conflict among the Federal Circuits regarding whether the provisions of § 9 of the Federal Arbitration Act, which fixes venue to confirm arbitral awards in the district where the award is made, are mandatory and jurisdictional, or merely establish alternative venues?

2. Whether the Court of Appeals erred by holding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applies to confer federal jurisdiction when the arbitral award sought to be enforced was made in the United States, was governed by United States law, and concerned a dispute solely between two United States citizens?

PARTIES TO THIS PROCEEDING

The caption of this case contains the names of all the parties to this proceeding. Petitioner MMP Investments, Inc. has no parent corporation nor any subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MMP Investments, Inc. ("MMP"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 107 F.3d 476 (7th Cir. 1997). (*See* App. 1-11.) The opinion of the District Court is reported at 927 F. Supp. 1078 (N.D. Ill. 1996). (App. 13-21.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1997. No rehearing nor suggestion for rehearing *en banc* was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There are various statutory provisions referred to in this Petition: (1) Article I(1) of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (1970) (the "New York Convention") (as implemented by 9 U.S.C. § 201); (2) the United States declaration of accession to the Convention (21 U.S.T. 2566, reprinted at notes following 9 U.S.C. § 201); and (3) Sections 9 and 202 of the Federal Arbitration Act (9 U.S.C. §§ 9, 202).

Article I(1) of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, as implemented by 9 U.S.C. § 201 of the Federal Arbitration Act, states, in pertinent part:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

21 U.S.T. 2517.

The United States' declaration of accession to the Convention states as follows:

> The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

21 U.S.T. 2566.

Section 9 of the Federal Arbitration Act states in pertinent part as follows:

> If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .

9 U.S.C. § 9.

Section 202 of the Federal Arbitration Act states as follows:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

STATEMENT OF THE CASE

A. Nature Of The Dispute.

This dispute arises out of a petition filed by the Respondent, Lander Co., Inc. ("Lander") seeking to apply the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention") (21 U.S.T. 2517), to confirm an arbitral award based upon a business dispute between two U.S. companies involving transactions in Poland. The award, however, was made in the United States (New York), applying New York law, and arose from agreements between MMP and Lander, both of whom are United States citizens (MMP is an Illinois corporation; Lander is a Delaware corporation). The Court of Appeals held that the Convention applied to authorize confirmation of the arbitration award despite the domestic nature of the arbitration process.

In March 1991, Lander and MMP entered into a distribution agreement, which provided that MMP would be the exclusive distributor of Lander's health and beauty care products in Poland for two years. Two years later, both parties entered into a second distribution agreement by which MMP became the exclusive manufacturer and distributor of Lander's products in Poland for another five years. Both distribution agreements contained an arbitration clause that requires any controversy arising under the agreements be arbitrated in accordance with the Rules of Convention and Arbitration of the International Chamber of Commerce (the "ICC") in New York, New York. Both agreements also contained provisions requiring that the terms of the agreements be construed under New York law.

In May 1993, MMP informed Lander that certain of its products were defective. Lander denied the existence of any such problems. After the parties were unable to resolve their dispute, Lander sent MMP notice in February 1994 that it was terminating their relationship under the two agreements. MMP, in turn, filed a request for arbitration with the ICC. Lander countered by filing its own claim for arbitration with the ICC. A New York arbitrator was appointed by the ICC to conduct the arbitration. The arbitration took place in New York.

On October 31, 1995, the arbitrator issued his award in favor of MMP on certain of its claims, and in favor of Lander on its counterclaim. Monetary relief was awarded by the arbitrator to Lander in the amount of $536,444.

B. Proceedings In The District Court.

On November 28, 1995, Lander filed a Petition in the United States District Court for the Northern District of Illinois seeking to enforce the arbitration award against MMP obtained exclusively in New York. In its Petition, Lander sought enforcement of the arbitration award under the New York Convention. MMP moved to dismiss Lander's Petition on the grounds that the New York Convention is not available to enforce an arbitral award made in the United States on the basis of an agreement between United States citizens in a dispute governed purely under domestic law (*i.e.*, New York law). In addition, MMP moved to vacate the arbitration award under the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.*

In reaching its decision, the District Court pointed out that there were no reported cases addressing the applicability of the New York Convention to an arbitral award in which (a) the party signatories were United States citizens; (b) the arbitration agreement provided that domestic (in this case, New York) law applied to the parties' dispute; and (c) the arbitration award was made in the United States. (App. 16.) The sole nexus for applying the Convention was that the parties' agreements called for performance of a portion of their contract in a foreign state. Finding the issue presented "as one of first impression" (*Id.*), the District Court granted MMP's motion to dismiss for lack of subject matter jurisdiction, holding that the award did not fall within the definition of a recognizable and enforceable award under the Convention. (App. 19-21.) In arriving at its conclusion, the District Court examined the history behind the New York Convention, finding that the language of the Convention's declaration "limits the enforcement and recognition of arbitral awards on a territorial basis, *that is, to those made in a country other than the United States*." (App. 19.) (emphasis added.) Because the arbitral award was made *in* the United States (specifically, New York), and not in a territory of "another Contracting State," as required under the express language of the Convention (21 U.S.T. 2517), the District Court held that the arbitral award could not be enforced in the United States. Lander's Petition to enforce the arbitral award was therefore dismissed for lack of subject matter jurisdiction. (App. 14, 21.)

C. The Court Of Appeals' Decision.

Lander appealed the District Court's dismissal of its Petition to the Seventh Circuit. The Court of Appeals reversed and remanded the District Court's judgment with instructions to reinstate Lander's suit under the Convention. In the process of reversing the District Court's interpretation of the Convention, however, the Seventh Circuit grappled with several important areas of federal law.

First, Judge Posner, writing for the Court, found that subject matter jurisdiction existed to enforce Lander's arbitral award under both the Federal Arbitration Act and the Convention. But in doing so, the Seventh Circuit had to confront initially the issue of whether venue in the Northern District of Illinois was proper under § 9 of the Federal Arbitration Act since Lander's arbitration award was rendered in New York, not Illinois. Under the express terms of § 9 of the Federal Arbitration Act, absent an agreement to the contrary, venue lies in the district in which the award was made. In this case, § 9 dictated that venue to enforce Lander's arbitration award lay in the Southern District of New York. (App. 7.) While the Court of Appeals recognized that § 9 had been interpreted as requiring an *exclusive*, as distinguished from an alternative, venue for confirming arbitration awards, and further acknowledged that other circuits had reached a "contrary" result, the Seventh Circuit, in following its own Circuit precedent, opted to interpret § 9 as being permissive, not mandatory. (*See In re VMS Sec. Litig.*, 21 F.3d 139, 142-45 (7th Cir. 1994) (App. 7.)) Specifically, the Seventh Circuit declined to align itself with the Ninth Circuit decision in *Sunshine*

Beauty Supplies, Inc. v. United States District Court, 872 F.2d 310, 312 (9th Cir. 1989), which held that the venue provisions contained in § 9 of the Federal Arbitration Act were mandatory and jurisdictional. (App. 8.) Had the Seventh Circuit followed Ninth Circuit precedent, it would have likely affirmed the District Court's judgment because venue was improper under § 9 of the Federal Arbitration Act in the Northern District of Illinois.

Second, once the Court of Appeals found that the venue provisions in § 9 of the Federal Arbitration Act were not mandatory, an examination of whether Lander's arbitral award could still be enforced under the Convention's terms had to be addressed. Sharply differing with the District Court, the Court of Appeals interpreted Article I(1) of the Convention far more broadly to mean that, even if the arbitration award was *made in the United States*, and involved only United States citizens, the Convention nonetheless governed to enforce the award under its provisions. In other words, despite it being undisputed that the arbitration award was made in the United States, and not "in the territory of another Contracting state," the Seventh Circuit interpreted Article I(1) to allow recognition and enforcement of Lander's arbitration award in the United States. The Seventh Circuit reached this interpretation by reading the United States' declaration of accession to the Convention to mean that the United States will enforce arbitral awards pursuant to the Convention simply if those awards are made in nations that *adhere to* the Convention. (App. 10.) And since here the arbitral award was made in the United States, which is "another signatory of the Convention," (*Id.*), the Seventh Circuit reasoned that the

award could be enforced under the New York Convention in the United States. (*Id.*) Stated differently, since the United States only will enforce arbitration awards made in nations that also adhere to the Convention, which necessarily includes the United States itself, the Convention can be used to enforce arbitration awards wholly between United States citizens, if, as here, the dispute arose out of a contract that involved a portion of the parties' performance in a foreign country. (*Id.*) In arriving at this novel interpretation of the Convention's language, the Court of Appeals cited no Supreme Court precedent, no federal circuit authority to support its conclusion, nor any Congressional or legislative history. Simply stated, the Seventh Circuit's decision was the first of its kind.

REASONS FOR GRANTING THE WRIT

MMP's Petition offers this Court the opportunity to authoritatively resolve, in a single decision, two related emerging issues of federal law in the arbitration sphere which this Court has never addressed. The first issue provides this Court with the chance to resolve the clear split in the Circuit Courts of Appeal regarding whether § 9 of the Federal Arbitration Act should be interpreted as requiring an exclusive venue in the district in which the arbitral award was rendered, or merely a permissive venue. The Seventh and Ninth Circuits already have each taken diametrically opposed views on this very issue; further splits should not be necessary to demonstrate the need for Supreme Court guidance. Certainly, the continued existence of divergent approaches offered

in different circuits on the interpretation of the same federal statute does little to foster uniformity of a federal enactment that is designed to have an international flavor. Given the scores of arbitration cases filed each year in federal court, the importance of settling the meaning ascribed to § 9 of the Federal Arbitration Act is clear so that litigants and courts alike will conclusively know where arbitration awards may be enforced in the federal system.

The second issue likewise offers this Court the opportunity to interpret an important international treaty in which the United States has long been a party signatory (along with 105 other nations), and which implicates the use of commercial arbitration as a dispute resolution mechanism. In this day and age of economically borderless nations, arbitration agreements that call for international performance with international effects are becoming far more common place as businesses reach out and have global impact. Members of this Court have so recognized. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S., 614, 638 (1985) ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."). The extent, however, to which federal court jurisdiction can be invoked exclusively by citizens of the United States to enforce on arbitration award rendered in the United States under an international treaty merits authoritative review.

I.

BY GRANTING MMP'S WRIT, THIS COURT CAN RESOLVE THE CONFLICT AMONG THE FEDERAL CIRCUITS WHETHER § 9 OF THE FEDERAL ARBITRATION ACT REQUIRES ARBITRATION AWARDS TO BE CONFIRMED EXCLUSIVELY IN THE DISTRICT IN WHICH THE AWARD WAS ENTERED.

Lander, the Respondent, obtained a favorable arbitration award against MMP in New York. Lander, however, never sought to confirm that arbitration award in the United States District Court for the Southern District of New York, as contemplated by the express language of § 9 of the Federal Arbitration Act. Rather, Lander filed a petition to confirm that award in the United States District Court for the Northern District of Illinois. The Seventh Circuit found this variance in venue to be immaterial, holding that § 9 of the Federal Arbitration Act "merely creates alternatives to conventional venue." (App. 7.) In so doing, the Seventh Circuit openly recognized that its opinion was directly "contrary" to the Ninth Circuit's decision in *Sunshine Beauty Supplies, Inc. v. United States District Court,* 872 F.2d 310, 312 (9th Cir. 1989). (App. 8.) But this split is not merely confined to that of the Seventh and Ninth Circuits, for nearly all of the other federal circuits as well have contributed to the lack of uniformity in interpreting § 9. MMP's Petition would provide this Court with the opportunity to authoritatively resolve this deepening divergence of opinion on an important question of federal jurisdiction.[1]

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[1] On appeal before the Seventh Circuit, Lander relied, in part, on § 9 of the Federal Arbitration Act as one of its grounds for the exercise of federal subject matter jurisdiction.

The controversy underlying this statutory dispute is relatively straightforward: does § 9 of the Federal Arbitration Act designate the district court where the award was made as the *only* court for jurisdictional purposes to confirm an arbitration award, or alternatively, does the Act merely permit jurisdiction and venue in that court? The federal courts are hopelessly divided on this very issue.

The Ninth Circuit has long interpreted the venue language in §§ 9 and 10 of the Federal Arbitration Act as being strictly mandatory. *See, e.g., Central Valley Typographical Union, No. 46 v. McClatchy Newspapers,* 762 F.2d 741, 744 (9th Cir. 1985); *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.,* 397 F.2d 935, 939 (9th Cir. 1968). When *Sunshine Beauty* was decided, the Ninth Circuit pointed out that "[t]here is a split of authority among the circuits as to whether section 9's venue provision is mandatory." *Sunshine Beauty,* 872 F.2d at 311.[2] Similarly, the Fifth and Sixth Circuits have construed § 9 to mandate exclusive jurisdiction and venue lying in the district court in which the arbitration award was made. *See, e.g., Island Creek Coal Sales Co. v. City of Gainsville, Florida,* 729 F.2d 1046, 1050 (6th Cir. 1984); *City of Naples v. Prepakt Concrete Co.,* 490 F.2d 182, 184 (5th Cir. 1974). So, too, have

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[2] While there is certainly a split of authority on whether § 9's venue provision is mandatory or permissive, conversely, courts that have ruled on the issue have agreed that the venue provisions of §§ 9 and 10 are to be interpreted with uniformity because they are "essentially identical actions." *Sunshine Beauty Supplies,* 872 F.2d at 312 n.4. Even the Seventh Circuit acknowledges this "near unanimity of opinion. . . ." *In re VMS Sec. Litig.,* 21 F.3d 139, 142 (7th Cir. 1994).

federal district courts sitting within the Eighth, Fifth and Third Circuits, respectively, adopted the mandatory approach to the venue provisions in §§ 9 and 10. *See, e.g., Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd.*, 798 F. Supp. 400, 403 (W.D. Tex. 1992); *Soo Line R.R. Co. v. Chicago & Northwestern Transp. Co.*, 737 F. Supp. 68, 69 (D. Minn. 1990); *Enserch Int'l Exploration, Inc. v. Attock Oil Co.*, 656 F. Supp. 1162, 1165-66 (N.D. Tex. 1987); *Arthur Imerman Undergarment Corp. v. Local 162, Int'l Ladies' Garment Workers Union*, 145 F. Supp. 14, 17 (D.N.J. 1956). As one federal district court has held, the reason for construing the statute in this fashion is clear: "'may' [as used in § 9] does not refer . . . to *which* court is authorized to vacate an arbitration award, but to the permissive nature of the *relief* that the district court is empowered to grant." *Tesoro Petroleum Corp.*, 798 F. Supp. at 404 (emphasis added); *see also Enserch Int'l Exploration*, 656 F. Supp. at 1165.

In direct contrast to these decisions making venue to enforce an arbitration award mandatory in the district where the award is made, other courts have found the language in §§ 9 or 10 of the Federal Arbitration Act to be permissive. These courts typically reason that "Congress would have used stronger language than 'such application may be made' or 'may apply' if the intention was to restrict the power of a federal court in Arbitration Act cases." *Paul Allison, Inc. v. Minikin Storage of Omaha, Inc.*, 452 F. Supp. 573, 574 (D. Neb. 1978). Circuits taking the permissive approach to the venue statute include the Seventh Circuit (*e.g., In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994) (and cases cited therein)), and the Second Circuit (*Smiga v. Dean Witter*

Reynolds, Inc., 766 F.2d 698, 706 (2d Cir. 1985); *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18 (2d Cir. 1986). District Court decisions within each of the Second, Third, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits have likewise adopted the permissive approach to venue under the Federal Arbitration Act. *See, e.g., United States ex rel. Kirchdorfer v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390-91 (E.D. Va. 1994); *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1252-53 (S.D. Fla. 1994); *Elgart v. Sono-Tek Corp.*, Cir. A. No. 88-7539, 1989 WL 136280 (E.D. Pa. Nov. 9, 1989); *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1315 (S.D.N.Y. 1988); *Wing v. J.C. Bradford & Co.*, 678 F. Supp. 622, 626 (N.D. Miss. 1987); *Amalgamated Clothing and Textile Workers Union v. Federation of Union Reps.*, 664 F. Supp. 995, 996 (S.D.W.Va. 1987); *NII Metals Servs., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 166 (N.D. Ill. 1981); *Paul Allison, Inc.*, 452 F. Supp. at 574-75.

The conflict among the Circuits reflects a fundamental disagreement over the interpretation of a federal statute. Indeed, the split is deep within the federal courts, with at least five Circuit Courts of Appeal having addressed the issue presented, resulting in a divergence of opinion. (*Compare* the Fifth, Sixth and Ninth Circuits taking the "mandatory" approach to venue, *with* the Second and Seventh Circuits adopting the "permissive" interpretation.) Such a conflict unnecessarily breeds not only a lack of uniformity in decision-making, but provides litigants with the ability to "forum shop" in an effort to find the most favorable venue available to them when seeking to confirm an arbitration award. Maneuvering of this kind certainly could not have been intended by the drafters of

§ 9 when they enacted the venue provision, and a substantial body of federal law already exists to support this position. In view of the importance of an authoritative answer to this question of federal law, this Court's guidance is necessary to settle this vexing procedural issue.

II.

THE SEVENTH CIRCUIT HAS UNDULY EXPANDED THE SCOPE OF THE NEW YORK CONVENTION TO INCLUDE ARBITRAL AWARDS MADE IN THE UNITED STATES THAT CONCERN DISPUTES SOLELY BETWEEN UNITED STATES CITIZENS.

The District Court below held that the New York Convention could not be invoked to recognize and enforce an arbitral award that was made in the United States, governed by United States law, and which involved a commercial dispute exclusively between two United States citizens. Despite this seemingly logical conclusion reached by the District Court, the Seventh Circuit reversed. In reaching its decision, however, the Seventh Circuit rejected the plain meaning of Article I(1) of the Convention, holding that, even though the arbitral award was *not* made in another State (the award being made in the United States), recognition and enforcement under the Convention nonetheless could proceed in the United States. (App. 10.) The Seventh Circuit went on to find the United States arbitration award to be "nondomestic" under Article I(1) despite the arbitration, the parties and the rule of decision, all being centered in the United States. Only the performance of the parties' contract involved a foreign country, and the Seventh Circuit relied on that fact to bring the Convention into play. (*Id.*). The Seventh Circuit cited no case authority inter-

preting the Convention in such a fashion. In fact, the District Court below specifically held that it had "found no other cases addressing the applicability of the Convention" to embrace such core domestic matters. (App. 16.) Because the Seventh Circuit's decision unduly expands the reach of the Convention far beyond its express terms, intervention by this Court is warranted in order to restore the Convention's usage to its originally intended function: enforcement of international arbitration awards.

The Convention was originally adopted in 1958, having been sponsored by the United Nations. The United States, however, did not become a signatory to the Convention until declaring its accession 12 years later, in 1970. (21 U.S.T. 2566.) Shortly thereafter, Congress enacted legislation implementing the Convention as a basis for empowering federal courts to enforce its provisions. *See* 9 U.S.C. §§ 201-208. As part of this legislation, Congress vested the federal district courts with original jurisdiction over any action or proceeding "falling under the Convention," since such actions are deemed to "arise under the laws and treatises of the United States." 9 U.S.C. § 203. Article I(1) of the Convention defines the types of arbitral awards enforceable under its provisions, and contains two criterion for its application. One is territorial, that is, the arbitration award must be made in the territory of another contracting state. The other criterion includes arbitral awards "not considered as domestic awards in the State where there recognition and enforcement are sought" ("nondomestic" arbitration awards). (Convention, Article I(1).) In other words, while the Convention always applies to the recognition and enforcement of an arbitral award made in another State, it may also apply if the award is considered to be

"nondomestic." *See* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 39 (1985). The Seventh Circuit substituted its own unchartered reasoning for that contained in the express terms of the Convention by misapplying both prongs under Article I(1).

As the District Court noted, in adopting the Convention as a party signatory, the United States made a binding declaration:

> The United States will apply the Convention, on the basis of reciprocity, to the recognition and enforcement *of only those awards made in the territory of another Contracting State*.

21 U.S.T. 2566, reprinted at notes following 9 U.S.C. § 201 (emphasis added). Contrary to the Seventh Circuit's interpretation, other circuits have sided with the District Court's decision below, finding the United States' declaration of accession to be an important limitation on the scope of the Convention. *See, e.g., Ministry of Defense v. Gould, Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989) ("The United States imposes an additional related condition on the award: it must be '*made in the territory of another Contracting State*.'") (emphasis added).

This Court has long held that the principal purpose of the Convention "was to encourage the recognition and enforcement of commercial arbitration agreements *in international contracts. . . .*" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added); *accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 658 (1985). In fact, over a decade ago, this Court remarked that the Convention contemplates "exceptions to arbitrability grounded in domestic law." *Mitsubishi*, 473 U.S. at 638 n.21.

It is undisputed that the parties' arbitration was not in any fashion made abroad; rather it was domestic in nearly every sense of the word. The underlying dispute was between two domestic corporations: one located in Illinois and the other in New Jersey. The arbitration between these two United States citizens was, in turn, conducted exclusively in New York and governed by New York substantive law. Finally, the arbitrator issued his award in New York. These factors logically rendered the arbitration to have been made in the United States, rather than "in the territory of another Contracting State," as required by Article I(1) of the Convention.[3] Yet, despite the arbitration award having all of these core domestic attributes, the Seventh Circuit found the Convention applicable. The Seventh Circuit's decision not only distorts the plain language of Article I(1) to the Convention, but openly ignores the United States' twenty-seven-year-old declaration of accession to the Convention: that the *enforcement* of an arbitration award in the United States could only occur when the award was *made abroad*—not in the United States. (*See* 21 U.S.T. 2566.) While cases are no doubt legion in applying the Convention to enforce arbitration awards where at least one of the party signatories to the arbitration agreement

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[3] The arbitration in New York was conducted pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Article 22 of those Rules states: "The arbitral awards shall be deemed to be made at the place of the arbitration proceedings and on the date when it is signed by the arbitrator."

is a foreign national,[4] until the Seventh Circuit's opinion, none has ever expanded the reach of the Convention to embrace the present dispute, where the only international nexus is that a portion of the parties' performance of the agreement occurred abroad.

By judicial fiat, the Seventh Circuit has now enlarged the Convention as a fountainhead conferring federal jurisdiction anytime an arbitration award is rendered in the United States between United States citizens where the dispute arises out of a contract that has at least some performance in a foreign state. Nothing in the Convention permits such an expansive interpretation. Quite the contrary, the United States, when becoming a party to the Convention, rejected that very construction. (21 U.S.T. 2566.) So also has a leading commentator on the Convention. *See,* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 50 (1985) (nothing in actual text nor in treaty's legislative history allows for enforcement of an arbitral award *made in the same country in which the award was entered*). Supreme Court guidance has now become essential to restore the Convention back to its intended purpose.

The Seventh Circuit held that the United States' accession declaration, which limited the application of the Convention in the United States to those arbitral

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[4] *E.g., Malarky Enters. v. Health Care Technology, Ltd.,* No. Civ. A. 96-2254-GIV, 1997 WL 219900, at *1 (D. Kan. Apr. 29, 1997) ("The arbitration provision at issue, revolving around a commercial agreement between entities of different nations to arbitrate in a foreign country, is governed by the [New York Convention].").

awards made *outside* of the United States, should be ignored in favor of reading § 202 of the implementing legislation in isolation. (App. 10-11.) Section 202 provides that awards arising from a relationship between United States citizens may be enforced under the Convention provided that the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. The District Court understandably rejected this approach, finding that "[s]uch an interpretation would create an inconsistency" between the accession declaration and the implementation language in § 202. (App. 20.) In reversing, the Seventh Circuit ignored long-standing precedent from this Court that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States,* 288 U.S. 102, 120 (1933). The Seventh Circuit never pointed to any such "clearly expressed" intent when Congress enacted § 202 of the Federal Arbitration Act, because none exists.

The District Court correctly recognized that Article I of the Convention, not § 202 of the Federal Arbitration Act, defines the contours of what arbitral agreements and awards may be enforced pursuant to the Convention's terms. (App. 19.) Section 202 does not come into play unless an arbitral award satisfies the criterion of Article I(1). The Seventh Circuit cited nothing in the text, legislative history or case law suggesting that § 202 of the Federal Arbitration Act statutorily grants a party *additional* rights to enforce an arbitral award in the United States beyond the limits set forth in the Convention. By its own terms, the implementing legislation of the Con-

vention merely provides the mechanism by which Congress enacted the Convention. 9 U.S.C. § 201 *et seq.* This Court has expressly so stated. *Scherk v. Alberto-Culver Co.*, 417 U.S. at 520 n. 15 ("In 1970 the United States acceded to the treaty . . . and Congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 *et seq.*, in order to implement the Convention.").

Without any textual or case law to support it, the Seventh Circuit has now impermissibly rewritten the scope of an international treaty to include domestic arbitration awards that are made entirely in this country, applying the domestic laws of the United States, and concerning commercial contracts entered into exclusively between United States citizens. Review by this Court is necessary to return the Convention back to its proper role, which is to enforce commercial arbitration agreements "in international contracts. . . ." *Scherk v. Alberto-Culver,* 417 U.S. at 520 n. 15; *accord Vimar Seguros Reaseguros, S.A. v. M/V Sky Reefer*, ___ U.S. ___, 115 S. Ct. 2322, 2329 (1995).

CONCLUSION

There is no reason to believe that the conflict among the Circuit Courts of Appeal, as well as the lower federal district courts, over the interpretation of the venue provisions of § 9 of the Federal Arbitration Act will resolve itself. Intervention by this Court is the only feasible solution to authoritatively decide this important federal procedural issue. Moreover, the Seventh Circuit's decision has unduly expanded the scope of an international treaty so that it now includes, for federal jurisdic-

tional purposes, any arbitration agreement exclusively entered into between United States citizens, governed by domestic law, and which arbitration awards are rendered in this country, simply because the dispute involves the performance of a portion of a contract in a foreign state. Nothing in the language of the Convention, nor in the United States' declaration of accession, supports such an expansive interpretation.

Therefore, MMP respectfully asks this Court to grant this Petition, set this case for full briefing and argument, and reverse the Seventh Circuit's decision.

Dated: May 16, 1997.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2684

LANDER COMPANY, INC.,

Plaintiff-Appellant,

v.

MMP INVESTMENTS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 95 C 50325—**Philip G. Reinhard,** *Judge.*

ARGUED JANUARY 8, 1997—DECIDED FEBRUARY 18, 1997

Before POSNER, *Chief Judge,* and COFFEY and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* This is a suit by the Lander Company against MMP Investments to enforce an arbitration award. The district court dismissed the suit for want of federal jurisdiction, 927 F. Supp. 1078 (N.D. Ill. 1996), and Lander appeals. The parties are American firms that made a contract (actually two contracts, but we can ignore that detail) for the distribution by MMP in Poland of shampoos and other products manufactured by Lander in the United States. The contract provides that disputes under it shall be settled by binding arbitration in New York City pursuant to the arbitration rules of the International Chamber of Commerce. The parties had a fall-

ing out, Lander notified MMP that it was terminating the contract, and the latter filed a request for arbitration with the International Court of Arbitration, an organ of the International Chamber of Commerce. Lander did not contest the jurisdiction of the Court of Arbitration. The dispute proceeded to arbitration in New York City before a New York lawyer designated by the Court, who after five days of evidentiary hearings decided in favor of Lander, awarding it more than $500,000 plus interest.

The arbitration rules of the International Chamber of Commerce make arbitration awards final and deem the parties by submitting their dispute to arbitration "to have waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration Art. 24(2). MMP refused to pay the award, so Lander brought this suit to enforce it in the federal district court in Chicago, which is MMP's home. The complaint (captioned "petition to confirm") recites the diverse citizenship of the parties, notes that the United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (1970) (the "New York Convention," as it is known), claims that the suit arises under the Convention and its implementing legislation, specifically 9 U.S.C. § 207, and states that the district court "has jurisdiction under 9 U.S.C. §§ 1, 9, 201, 202, 203 and 207, and under 28 U.S.C. §1332" and that the amount in controversy (exclusive of interest and costs) exceeds $50,000. When the complaint was filed this was the minimum amount in controversy specified by 28 U.S.C. § 1332, the statute that confers diversity jurisdiction on the federal courts. The amount has since been raised to $75,000.

MMP moved to dismiss the suit on the ground that the New York Convention was inapplicable to the parties' arbitration; but in addition it moved to vacate the award. The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, allows only three months for mounting a judicial challenge to an arbitration award that is subject to the Act, 9 U.S.C. § 12, and MMP was concerned, as it explained to the district

court, that "although Lander takes the position now that the Arbitral Award is covered by the New York Convention, other allegations in its Petition to Confirm suggest that if it is unsuccessful under the Convention, it will seek to enforce the Arbitral Award under the Federal Arbitration Act." Under the Act, if you fail to move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party. *Chauffeurs, Teamsters, Warehousemen & Helpers v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (7th Cir. 1980); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Florasynth v. Pickholz*, 750 F.2d 171, 174-77 (2d Cir. 1984); 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 38.3.3.2 (1994). In contrast, the New York Convention contains no provision for seeking to vacate an award, although it contemplates the possibility of the award's being set aside in a proceeding under local law, Art. V(1)(e), 21 U.S.T. at 2520, and recognizes defenses to the enforcement of an award.

MMP asked the district judge to defer ruling on its motion to vacate until the judge decided whether the New York Convention was applicable. Lander opposed the motion, taking vigorous exception to MMP's contention that the New York Convention did not apply. It did not argue that the arbitration award was enforceable under the Federal Arbitration Act. There were no other filings, and no oral argument, before the district judge ruled on the motions. He held that the New York Convention did not apply, and went on to dismiss the suit without mention of the Federal Arbitration Act. The Act's one-year statute of limitations (9 U.S.C. § 9) would bar Lander from filing a new suit under the Act. So far as appears, Lander has no other judicial remedy to enforce its award, though conceivably it could sue to enforce it in Poland, hoping MMP has assets there.

The judge should not have dismissed Lander's suit, at least on jurisdictional grounds. The complaint sufficient-

ly alleged jurisdiction under the Federal Arbitration Act as well as under the New York Convention. No other purpose than to allege jurisdiction under the Act can be assigned to the allegation of diversity jurisdiction and the citation of 28 U.S.C. § 1332, the diversity statute, and 9 U.S.C. § 9, the provision of the Federal Arbitration Act that authorizes suits in federal court to enforce arbitration awards in cases arising out of maritime contracts or contracts evidencing a transaction involving interstate or foreign commerce, 9 U.S.C. §§ 1, 2; no one doubts that the contract between Lander and MMP falls into the second category. The allegation of diversity was necessary because the substantive law applicable to the resolution of the parties' dispute is not federal, and the Federal Arbitration Act is limited to arbitration agreements or awards that arise out of disputes that could be litigated in federal court. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n. 32 (1983); *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3569, pp. 170-72 (2d ed. 1984). Chapter 2 of Title 9, the chapter that creates jurisdiction to enforce awards made under the New York Convention, is not so limited, 9 U.S.C. § 203, and citation of the diversity statute would thus have been unnecessary had Lander thought that the district court had jurisdiction only by virtue of the Convention.

MMP's motion to vacate the arbitration award under the Federal Arbitration Act shows that it realized that Lander intended to base jurisdiction on the Act if necessary, and of course MMP said as much. The only basis for arguing that Lander waived jurisdiction under the Act is thus its failure, in responding to the motion to vacate, to confirm MMP's suspicion that the Act was indeed an alternative ground of jurisdiction. The district judge overlooked the significance of the allegation of diversity. He said that "the allegations pertaining to diversity jurisdiction . . . are merely surplusage as there are no non-

federal claims presented by the petition to confirm." 927 F. Supp. at 1078 n. 1. Was this oversight a product of deception by Lander? We think not. The thrust of MMP's response to the suit was to challenge jurisdiction under the New York Convention, and it was to this challenge that Lander replied. One reason for Lander to refrain from discussing an alternative basis for jurisdiction was that MMP was not arguing that the Federal Arbitration Act was inapplicable—indeed was acknowledging that it might be applicable. Lander was reasonable, if in retrospect incautious, in assuming that even if the district court agreed with everything that MMP was arguing, the only consequence—because the only relief sought by MMP—would be that the court would dismiss so much of the complaint as depended on the New York Convention and proceed to adjudicate the rest of the complaint under the Federal Arbitration Act.

In any event a "waiver" of jurisdiction in the sense not of a deliberate choice to forgo basing jurisdiction on a particular statute but of an inadvertent failure to cite the statute (so "forfeiture" is the better term than "waiver") is entitled to less weight than a waiver of a substantive ground for relief. *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1328 (7th Cir. 1995); *Buethe v. Britt Airlines, Inc.*, 749 F.2d 1235, 1238-39 (7th Cir. 1984); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1210, pp. 121-22 (2d ed. 1990). The court either has jurisdiction or it does not. If it is pretty obvious that it has jurisdiction, the failure to cite the right statute is harmless and ought not lead to a forfeiture, as it would here, assuming the inapplicability of the New York Convention, because of the one-year statute of limitations for suits to enforce arbitration awards under the Federal Arbitration Act. When a district judge sees a request to confirm an arbitration award coupled with an allegation of diversity jurisdiction, a light bulb labeled "Federal Arbitration Act" ought to flash in his head; it is not an esoteric basis of federal jurisdiction. It is quite otherwise with the substantive allegations in a complaint. A plain-

tiff typically makes a selection on tactical grounds from a menu of possible grounds for asserting liability, and the district judge is in no position to guess which omitted grounds were omitted by sheer oversight and ought to be restored later.

The waiver argument fails for the further reason that it itself was waived, by MMP's conduct in this dispute, beginning with the contract, in which it agreed to *binding* arbitration. To agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award. Were there a rule that no one could be ordered by a court to pay an arbitration award unless he agreed to submit himself to the court's jurisdiction, the signing of the agreement to *binding* arbitration would be a waiver of the rule. To invoke arbitration pursuant to such an agreement, as MMP also did, is further to agree to be bound, if necessary through court action, by the arbitrator's award, provided, of course, that the award does not have any infirmity of a sort that a court can use to invalidate an arbitration award. Imagine MMP's indignation if it had won the arbitration and Lander had denied that any court in the United States had jurisdiction to enforce the award.

Objections to subject-matter jurisdiction cannot be waived. But that is not the issue. By assumption there is jurisdiction under the Federal Arbitration Act. MMP's argument is that, even so, Lander cannot invoke that jurisdiction, because it failed to allege it more emphatically. The argument, in short, is not jurisdiction; it is waiver; and waiver arguments, unlike jurisdictional arguments, are waivable. E.g., *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995).

We cannot stop here. We have assumed rather than established that the district court had jurisdiction under the Federal Arbitration Act. And even if it does, if there are differences between that Act and the New York Convention that are material to the resolution of Lander's suit,

we may have to decide whether the Convention applies. The Convention (including its implementing legislation) is more than a statute that confers jurisdiction; it contains procedural provisions besides; if it is inapplicable, but the court has jurisdiction on some other basis, its inapplicability may still affect the course of the suit. It has, for example, a longer statute of limitations—three years rather than one. 9 U.S.C. § 207. That is not a factor here. But if a court asked to enforce an arbitration award has less authority to turn down the request (in whole or part) under the Convention than under the Federal Arbitration Act, this could make a difference in this case—and may be why Lander, the enforcing party, was so eager to bottom jurisdiction on the Convention. One court, noting that manifest disregard of the law is an implied ground for vacating an award under the Act, but neither an express nor, the court thought, an implied defense to enforcement under the Convention, has held that it is indeed harder to knock out an award under the Convention. *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996). We need not decide whether this is right; the issue (expressly left open by the Second Circuit in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974)) has not been argued to us. It is enough that it *may* be right, meaning that whether the Convention is applicable may make a difference even though jurisdiction is secure under the Federal Arbitration Act.

And it is secure. It is true that the provision of the Act that confers jurisdiction on the federal courts to confirm arbitration awards authorizes confirmation only in the court specified in the arbitration agreement (none was specified) or in the district in which the arbitration was conducted, which was the Southern District of New York rather than the Northern District of Illinois. 9 U.S.C. § 9. But this provision of section 9 merely creates alternatives to conventional venue, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 329 (7th Cir. 1995); *In re VMS Securities Litigation*, 21 F.3d 139, 142-45 (7th

Cir. 1994), rather than exclusive venues for confirming arbitration awards. (Some earlier cases in other circuits, discussed in *VMS*, are contrary, e.g., *Sunshine Beauty Supplies, Inc. v. U.S. District Court*, 872 F.2d 310, 312 (9th Cir. 1989), but they contain no arguments for their interpretation.) The district in which the defendant resides is a conventional venue for civil cases. There is no reason to force Lander to go to another district that would be less convenient for *both* parties, which is why those contrary decisions are not persuasive.

It could also be argued that the New York Convention was intended to be exclusive within its domain. We would then *have* to consider its applicability to this case because if it were applicable there would be no jurisdiction under the Federal Arbitration Act. Nothing in the Convention or its history, or in the implementing legislation or *its* history, suggests exclusivity, and it would be particularly perverse in a case such as this involving a dispute squarely within the scope of the Federal Arbitration Act between two U.S. firms. In fact, Article VII of the Convention provides that the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." 21 U.S.T. at 2520-21. We agree with the Second Circuit that there is "no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983).

So there is jurisdiction under the Act but we still have to consider whether the course of the suit may be affected if the New York Convention is also applicable. Although the Convention is not exclusive, the U.S. implementing legislation provides that in the event of a conflict between its terms and those of the Federal Arbitration Act the Convention's terms govern. 9 U.S.C. § 208; *M & C Corp. v. Erwin Behr GmbH & Co., KG, supra*, 87 F.3d at 851. We noted earlier that the scope of judicial review under

the two regimes may be different. The only substantive defense to the enforcement of the award that MMP claims to have, however, is a defense that part of the award was based on a matter that had not been submitted to the arbitrator; in other words, that the arbitrator had exceeded his terms of reference. And that is a defense under both the Federal Arbitration Act and the New York Convention. Compare 9 U.S.C. §§ 10(a)(4), 11(b), with Article V(1)(c) of the Convention. The wording is slightly different but there is no reason to think the meaning different. *Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, *supra*, 508 F.2d at 976. So we do not have to decide whether the Convention also applies to this case. But we think we should decide. The possible difference in the scope of judicial review that we mentioned earlier could still make a difference in the outcome of this case, because the litigation is in an early stage and MMP may want and be permitted by the district court to interpose a defense of manifest disregard of law by the arbitrator. Moreover, the issue of the Convention's applicability has been fully and ably briefed and vigorously argued, and is bound to recur (under conditions no more favorable for decision) with the expansion of foreign activities by U.S. firms.

Article I(1) provides that the Convention shall apply not only to arbitral awards made in a different country from the one in which enforcement is sought (not the case here) but also to "arbitral awards not considered as domestic awards" in the country in which enforcement is sought. Article I(3), however, authorizes a country "on the basis of reciprocity [to] declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." And in its declaration of accession the United States along with many other signatories announced that it "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the

territory of another Contracting State." 21 U.S.T. at 2566; see notes following 9 U.S.C.A. § 201. Read no further, says MMP; the arbitration award in this case was made in the United States, not in another contracting state. But as natural a way to read the declaration is that the United States will enforce pursuant to the Convention only arbitral awards made in nations that also adhere to the Convention. This is the significance of the reference to reciprocity. The United States will not enforce an arbitration award made in a country that, by failing to adopt the Convention, has not committed itself to enforce arbitration awards made in the United States. Granted, "a Contracting State" would be clearer, but "another Contracting State" is clear enough in context; it means "another signatory of the Convention, like the United States, as opposed to nonsignatories."

This reading of Article I, in contrast to a reading that would preclude enforcement in U.S. courts of awards rendered in this country, is supported by the U.S. implementing legislation: Chapter 2 of Title 9 authorizes the enforcement of arbitration awards in disputes wholly between U.S. citizens if, as here, the dispute arose out of a contract involving performance in a foreign country. 9 U.S.C. § 202. It could be argued that in so providing section 202 goes further than the Convention. An arbitration award made in *and* sought to be enforced in the United States is a domestic award according to traditional principles of Anglo-American conflicts of law, under which the law of the place of the award determines whether the award is valid. *Restatement (Second) of Conflicts of Law* § 220, comment c (1971). And the Convention excludes domestic awards. The alternative is to view section 202 as defining nondomestic award in Article I(3) (more precisely as redefining it, altering the traditional Anglo-American approach)—or indeed as going beyond the Convention. We need not decide. MMP does not argue that section 202 is invalid, whether or not it tracks the Convention; nor could it argue that, for the statute is comfortably within Congress's commerce power. And if it thus is valid, it doesn't matter whether it goes beyond the Convention.

This makes the language of section 202 critical. The section adopts the provisions of the Convention for any "arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title"—that is, either a "maritime transaction or a contract evidencing a transaction involving commerce," 9 U.S.C. § 2—provided only that if the relationship is entirely between U.S. citizens, it must involve performance abroad or have some other reasonable relation with a foreign country. There is no ambiguity; the relationship between Lander and MMP falls squarely within the inclusion and outside the exclusion. Congress may have believed that confining enforcement under the Convention to awards rendered abroad would drive away international arbitration business from New York. Or it may have been seeking to secure the Convention's benefits, on the basis of reciprocity, to American businesses seeking judicial enforcement of foreign arbitration awards in the countries in which the award was made. Or it may simply have wanted to simplify the procedures governing the foreign activities of American firms, since American firms doing business abroad are bound to have contracts with foreign firms as well as other American firms. Whatever Congress's precise thinking on the matter, it spoke clearly.

The only other appellate court to have addressed the question whether the Convention applies to suits in the United States to enforce arbitration awards made here has held that it does apply, as we hold today. *Bergesen v. Joseph Muller Corp., supra.* The case differs from ours insofar as the disputants were both foreign corporations, but it is a difference irrelevant to the Second Circuit's reasoning or our own in this case.

The judgment of the district court is reversed with instructions to reinstate Lander's suit.

REVERSED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 18, 1997

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 96-2684

LANDER COMPANY, INCORPORATED,
a New Jersey Corporation,

Plaintiff-Appellant

v.

MMP INVESTMENTS, INCORPORATED
an Illinois Corporation,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Western Division
No. 95 C 50325—Philip G. Reinhard, Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

927 F.Supp. 1078

LANDER CO., INC., a New Jersey Corporation, Petitioner,

v.

MMP INVESTMENTS, INC., an Illinois Corporation, Respondent.

No. 95 C 50325.

United States District Court,
N.D. Illinois,
Western Division.

June 4, 1996.

* * * * *

MEMORANDUM OPINION AND ORDER

REINHARD, District Judge.

INTRODUCTION

Petitioner, Lander Co., Inc., filed a petition to confirm an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (Convention) issued by an arbitrator in New York, New York on October 31, 1995. Jurisdiction is alleged under 9 U.S.C. §§ 1, 9, 201, 202, 203 and 207, as well as 28 U.S.C. § 1332 and venue is proper pursuant to 9 U.S.C. § 204.[1] Respondent, MMP Investments, Inc.,

[1] The petition to confirm actually presents solely a federal question arising under Title 9 and, thus, 28 U.S.C. § 1331 provides the proper basis for jurisdiction. The allegations pertaining to diversity jurisdiction under section 1332 are merely surplusage as there are no non-federal claims presented by the petition to confirm.

has moved to dismiss the petition to confirm. Alternatively, respondent requests leave to present a complete record of its defenses under Articles IV and V of the Convention. Petitioner, in response to this latter request, asks this court to order respondent to post a bond to secure payment of the arbitral award.

FACTS

The following facts are taken from the petition to confirm and are viewed in a light most favorable to petitioner, the non-moving party.[2] According to the allegations of the *1079 petition, in March 1991 petitioner and respondent entered into a written distributorship agreement which provides that respondent would be the exclusive distributor of petitioner's products in Poland for a period of two years. The distributorship agreement further provides, in pertinent part, that respondent will "distribute and advertise" petitioner's products in Poland.

In February 1993, the parties entered into a technical service agreement under which respondent became the

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[2] Respondent, in its motion to dismiss, refers to Fed.R.Civ.P. 81(a)(3) and 12(b)(6) as its procedural basis for dismissal. Rule 81(a)(3) provides, in relevant part, that the rules of civil procedure apply in proceedings under Title 9 of the United States Code "only to the extent that matters of procedure are not provided for in [Title 9]." Thus, because Title 9 does not contain a provision applicable to a motion to dismiss a petition to confirm, Rule 12(b) applies. Rule 12(b)(1), rather than Rule 12(b)(6), is the proper procedural basis for the motion to dismiss, however, as the motion challenges the jurisdictional basis of the petition, that is, whether this court has the authority to confirm the arbitral award under the Convention. Applying Rule 12(b)(1), the court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir.1993).

exclusive manufacturer and distributor of petitioner's products in Poland for five years. Further, the technical service agreement states, in relevant part, that respondent "will use its best efforts to promote the sale of a maximum quantity" of petitioner's product "including the establishment and development of a competent sales force of adequate size and appointment of capable sub-distributors and an experienced advertising consultant." The technical services agreement also provides that all notices be sent to Michael Mucha of MMP Investments in Cary, Illinois and also to "MMP-Poland . . . Attn: Jacek Slowakiewicz." Respondent is further required under the technical services agreement to carry adequate product liability insurance to protect and hold harmless petitioner in Poland.

Both agreements contain an arbitration clause which requires that any controversy arising under the agreements be arbitrated in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce with said arbitration being conducted in New York, New York. The agreements also provide that they shall be construed in accordance with New York state law.

In May 1993, a controversy arose out of the agreements to the extent that respondent claimed that certain products it received from petitioner were defective. In an effort to cure the alleged problems, petitioner's chairman of the board visited Poland. In February 1994, petitioner sent respondent a final termination notice.

Pursuant to the arbitration clause in the agreements, respondent filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC Court). After the parties submitted their pleadings, the ICC Court appointed a sole arbitrator from New York to hear the dispute.

In January 1995 the arbitrator and the parties executed a terms of reference in which they acknowledged that the arbitral tribunal was properly constituted and that the arbitrator had jurisdiction. In July 1995, hearings were conducted, and the parties submitted exhibits and briefs. The arbitrator issued his award on October 31, 1995 in favor of petitioner for $536,444.

CONTENTIONS

Respondent contends that the petition to confirm should be dismissed because where, as here, an arbitral award is issued in the United States and is based on an agreement between two United States companies, providing that New York law will apply, it does not fall within the definition of a recognizable and enforceable award under the Convention. Petitioner responds that in light of the language of section 202 of the implementing legislation, 9 U.S.C. § 202, the arbitral award is recognizable and enforceable under the Convention because the agreements call for performance in a foreign state.

DISCUSSION

The court begins by noting the dearth of cases interpreting the Convention and its implementing legislation under Title 9. Furthermore, the parties have accurately described this case as one of first impression. The court has found no other case addressing the applicability of the Convention to an arbitral award[3] between two domestic

[3] The case of *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Penn.1976), while somewhat similar to the present case, is distinguishable as in that case one party sought to have the district court order arbitration under the Convention rather than having an arbitral award confirmed thereunder. *See Fuller*, 421 F.Supp. at 941 n. 3.

companies, *1080 under domestic law, entered into in the United States with agreements calling for performance in a foreign country. Nonetheless, the court considers this case to boil down to the singular issue of whether the provisions of the agreements calling for performance in Poland are sufficient to bring the arbitral award within the terms of the Convention.

To properly assess this issue, it is first necessary to look to the history behind the Convention. A proposed draft of the Convention called for it to apply only to arbitration awards rendered in a country other than the one wherein enforcement was sought. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir.1983). Such a proposal was controversial, however, because some countries did not want an arbitral award to be defined only on a territorial basis, i.e., by the country in which it was entered. *Id.* As an alternative to the territorial definition, several countries proposed that the Convention apply to arbitral awards other than those considered as domestic in the country in which they are relied upon. *Id.* Other countries, including the United States, urged adoption of a territorial criterion only. *Id.*

Eventually a compromise was urged whereby both criteria would be included. *Bergesen*, 710 F.2d at 931. This compromise was intended to restrict the territorial concept. Id. Thus, the final language of the Convention provides that the "Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . ." and that it "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Convention, Art. I, § 3.

To assure accession to the Convention by the greatest number of countries, two reservations were included in Article I(3). *Id.* The one of relevance to this case provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." Convention, Art. I, § 3. The United States made such a declaration in acceding to the Convention. See 9 U.S.C. § 201 (listing declarations of various acceding nations and quoting that the United States "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State"); *see also Bergesen*, 710 F.2d at 932 (citing Presidential Proclamation, 21 U.S.T. 2517, T.I.A.S. No. 6997 (Sept. 1, 1970)). The adoption of the declaration does not, however, give rise to a narrow interpretation of the Convention. *Bergesen*, 710 F.2d at 933. This is so because the Convention should be interpreted broadly to effectuate its recognition and enforcement purposes. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed.2d 270 (1974)).

In deciding the issue in this case, the court will look first to the terms of the Convention itself. Article I(1) states, in pertinent part, that the "Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . ." The parties here do not contest, and rightfully so, that the arbitral award at issue implicates the Convention under this "territorial" provision. The arbitral award at issue was clearly made in the United States.

The second relevant portion of Article I(1) provides that the Convention "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The Convention itself does not define what is meant by a non-domestic award. Petitioner asserts that such a definition is provided by section 202 of the [sic] Title 9. This assertion, however, overlooks the declaration of accession wherein it is stated that the United States "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only awards made in the territory of another Contracting State." This declaration, by its express terms, limits the *1081 enforcement and recognition of arbitral awards on a territorial basis, that is, to those made in a country other than the United States.

The language of section 202 of Article 9 does not alter this interpretation. Section 202 merely states, in relevant part, that an award arising out of a commercial relationship "entirely between citizens of the United States" shall not fall under the Convention "unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states." The court does not interpret this language as expanding the scope of the Convention or as being inconsistent with the United States' declaration to apply the Convention on a territorial basis only, *see Bergesen*, 710 F.2d at 931.

First, the language is cast in terms of exclusion rather than inclusion. But it does so based on the status of the parties rather than the origin of the award. Hence, if two citizens of the United States obtain an award in another country (an award that would otherwise be enforceable under Article I(1) of the Convention) that award is excluded from being enforced under the Convention notwith-

standing its otherwise enforceability under the territoriality provision of Article I(1) of the Convention. This limitation is itself limited, however, by the qualifying language that makes the award enforceable if it involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation to a foreign country. Thus, an award from another country that involves as parties two citizens of the United States may nonetheless be enforceable under the Convention if it meets one of the foreign relationship criteria set forth in the qualifying language. The qualifying language does not, however, serve to expand the scope of the Convention, as acceded to by the United States, to include an award between United States' parties issued in the United States. Such an interpretation would create an inconsistency between the accession declaration of the United States and the implementing language of section 202 of Article 9. The court will not reach such an anomalous result when a consistent interpretation is reasonably available. Furthermore, there is nothing in the legislative history which detracts from this interpretation.

Nor does the court agree with petitioner's contention that such language defines non-domestic arbitral awards. First, as the court has already discussed, the accession declaration of the United States effectively negates the non-domestic award option of Article I(1). Accordingly, there would have been no need to define a non-domestic award via the implementing legislation. Second, had Congress intended to do what petitioner suggests, it could have done so in a much more clear and straightforward manner rather than by backing into such a definition via language designed to limit a limitation. See A.J. van den Berg, When is an Arbitral Award Nondomestic Under the New York Convention of 1958?, 6 Pace L.Rev. 25, 48-49 (1985).

In reaching its conclusion, the court does not consider *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Penn.1976), to support a different result. That case addressed the issue of whether two United States parties to an agreement could be compelled to arbitrate under the terms of the Convention. As the *Fuller* court itself noted, that is a different situation from one concerning the recognition and enforcement of an arbitral award. *Fuller*, 421 F.Supp. at 941 n. 3. The *Fuller* case is distinguishable from the present case and its reasoning is not persuasive on the issue before this court.[4]

CONCLUSION

For the foregoing reasons, the court grants respondent's motion to dismiss the petition to confirm an arbitral award and *1082 dismisses this cause in its entirety. Accordingly, respondent's motion for an order requiring a bond to be posted is denied as moot.

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[4] Similarly, while the general propositions in *Bergesen* are helpful to an understanding of the history and purpose of the Convention, that case is readily distinguishable on its facts, i.e., it concerned two foreign parties seeking confirmation of an arbitral award made in the United States. More importantly, the *Bergesen* court's reliance, in part, on the language in section 202 of Title 9 in defining a non-domestic award under Article I of the Convention lacks efficacy here as this court had determined that the United States did not adopt the non-domestic option of Article I.

(2)

Supreme Court, U.S.
FILED
JUN 17 1997
OFFICE OF THE CLERK

No. 96-1844

In The

Supreme Court of the United States

October Term, 1996

MMP INVESTMENTS, INC.,

Petitioner,

v.

LANDER CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. May a party who started an arbitration and lost on counterclaims, challenge venue for its enforcement for the first time in this Court and thereby protract recovery by urging mandatory venue in the place of the award, given that permissive venue where the party resides better advances twin goals of arbitration as quick and cheap commercial dispute resolution?

2. Whether the Court of Appeals properly held that an arbitral award made in the United States, involving transactions abroad between U.S. companies, may be enforced in the United States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), given that its implementing legislation, 9 U.S.C. § 201 *et seq.*, provides *inter alia* that transactions abroad between U.S. citizens fall under the New York Convention?

3. Whether a party, who agrees to binding arbitration, commences arbitration under the terms of the agreement and loses on counterclaims, has waived all jurisdictional objections to the other party's right to recover under the arbitral award?

PARTIES TO THE PROCEEDING

Petitioner MMP Investments, Inc., was the claimant before the International Chamber of Commerce Court of International Arbitration, was the respondent in the U.S. District Court for the Northern District of Illinois, and was the appellee in the U.S. Court of Appeals for the Seventh Circuit, the court whose judgment it now seeks to reverse.

Respondent Lander Co., Inc., was the respondent and counter-claimant before the International Chamber of Commerce Court of International Arbitration, was the petitioner in the U.S. District Court for the Northern District of Illinois, and was the appellant in the U.S. Court of Appeals for the Seventh Circuit.

Respondent Lander Co., Inc. is wholly owned by Claneil Enterprises, Inc., a Delaware corporation, which is privately owned.

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BRIEF IN OPPOSITION

Respondent Lander Co., Inc., respectfully prays that the Petition for Writ of Certiorari sought in this matter be denied.

OPINION BELOW

Petitioner MMP Investments, Inc., seeks review of the decision of the U.S. Court of Appeals for the Seventh Circuit of February 18, 1997. That court's opinion is reported, *see Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), and is reprinted in Appendix 1-11 to the Petition for the Writ of Certiorari.

The Seventh Circuit's opinion addressed the following three issues:

(a) What is the proper scope of waiver in enforcing a binding arbitration award, where a party who started the arbitration and lost on counterclaims, attempted to challenge its enforcement as lacking subject matter jurisdiction?

(b) What is the proper interplay between Chapters 1 and 2 of Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq.* and 201 *et seq.* respectively, where a party who defended and won on counterclaims in arbitration sought to enforce it under both Chapters, by alleging jurisdiction under Chapter 1 as based on the parties' diversity and under Chapter 2 as based on federal question?

(c) What is the proper application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), where a party to a dispute involving transactions abroad between two

U.S. companies sought to enforce U.S.-made arbitral award in the United States under the New York Convention, given that its implementing legislation, 9 U.S.C. § 201 *et seq.*, provides *inter alia* that a commercial relationship between U.S. citizens which contemplates performance abroad or some reasonable relation with a foreign state falls under the New York Convention?

The Seventh Circuit held:

(a) A party's conduct, beginning with agreement to *binding* arbitration and subsequently followed by the party's invocation of arbitration pursuant to the agreement, means the party's agreement to be bound by the outcome. That is, to agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award, i.e., a waiver to dispute the jurisdictional right to judicial relief to enforce the award.

(b) Nothing in the New York Convention or its history, or in the U.S. implementing legislation or its history, suggests exclusivity of Chapter 2 of the FAA, which implements the New York Convention, over Chapter 1 of the FAA, which deals with typical arbitration. Such exclusivity is particularly perverse in this case involving two U.S. companies, whose dispute falls squarely within the scope of Chapter 1 of the FAA. There is no reason to assume that Congress did not intend to provide overlapping coverage between Chapters 1 and 2 of the FAA.

(c) Article I(1) of the New York Convention applies not only to arbitral awards made in a different country from the one in which enforcement is sought but also to non-domestic arbitral awards. In acceding to the New

York Convention, the United States made a declaration under Article I(3) authorizing it to apply the New York Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State. This means the United States will enforce pursuant to the New York Convention only arbitral awards made in nations which also adhere to the New York Convention. Chapter 2 of the Act, 9 U.S.C. § 201 *et seq.*, which implements the Convention, supports this reading by authorizing enforcement of arbitral awards in disputes wholly between U.S. citizens if, as here, the dispute arose out of a contract involving performance abroad. Accordingly, the New York Convention applies to suits in the United States to enforce arbitration awards made here.

In reaching its decision, the Seventh Circuit agreed with the only other appellate court to have addressed the latter issue. *Bergesen v. Joseph Miller Corp.*, 710 F.2d 928 (2d Cir. 1983). In applying the rules set forth above, the Seventh Circuit reversed the judgment of the district court with instructions to reinstate Lander Co., Inc.'s suit.

STATEMENT OF THE CASE

Lander Co., Inc. ("Lander") initiated this suit against MMP Investments, Inc. ("MMP") to enforce an arbitration award. The parties are American companies agreeing since 1991 to have MMP distribute in Poland shampoos and other products manufactured by Lander in the United States, or produced by MMP under Lander's quality control. Their agreements provided that all disputes

should be settled by binding arbitration in New York City pursuant to the arbitration rules of the International Chamber of Commerce.

The parties had a falling out in 1993. In early 1994, Lander notified MMP that it was terminating the distribution agreements, and MMP filed a request for arbitration with the International Court of Arbitration ("ICC Court"), an arm of the International Chamber of Commerce. Lander answered, counterclaimed and did not contest the jurisdiction of the ICC Court. According to the terms of the parties' agreements, the dispute proceeded to arbitration in New York City before Steven A. Hammond, Esq. of Hughes Hubbard & Reed, One Battery Park Plaza, New York, NY, as Sole Arbitrator designated by the ICC Court.

Arbitrator Hammond decided for Lander. After five days of evidentiary hearings, including testimony of eight witnesses, over one hundred exhibits, the hearing transcript exceeding 1,300 pages, and the parties' pre-hearing and post-hearing briefs and memoranda of fact and law, he awarded Lander over $500,000 USD plus interest in a meticulously detailed 38 page arbitral award. He found that Polish "sale[s] of counterfeit Lander shampoo by MMP constitute[d] a serious breach of contract," "MMP's counterfeiting constituted common law infringement and unfair competition. . . . As such Lander is entitled to the full measure of damages arising from the [MMP] counterfeiting activity."

The arbitration rules of the International Chamber of Commerce make arbitration awards final and deem the parties by submitting their dispute to arbitration "to have

waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration Art. 24(2).

When MMP refused to pay the award, Lander brought this suit to enforce it in the federal district court in Illinois, where MMP resides. Lander asserted jurisdiction under both Chapters 1 and 2 of FAA, and noted that the United States is a party to the New York Convention. More specifically, it claimed that district court "has jurisdiction under 9 U.S.C. Secs. 1, 9, 201, 202, 203 and 207, and under 28 U.S.C. sec. 1332" and that the amount in controversy (exclusive of interest and costs) exceeds $50,000.[1]

In response, MMP first moved to dismiss the suit on the ground the New York Convention and thus Chapter 2 of the FAA was inapplicable to the parties' arbitration. Then, MMP moved to vacate the award under Chapter 1. Chapter 1 of the FAA allows only three months for challenging an arbitration award subject to the Act, 9 U.S.C. Sec. 12, and MMP was concerned, as it explained to the

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[1] Lander requested relief under *both* Chapters 1 and 2 of Title 9 U.S.C. Under Chapter 1, it pleaded jurisdiction on the basis of diversity of citizenship as would be required in a typical contract enforcement cause of action. Allegations pertaining to 28 U.S.C. § 1332 and 9 U.S.C. §§ 1, 9 are directed to this. Under Chapter 2, Lander pleaded that its award arose under the Convention, namely 9 U.S.C. 201, 202, 203 and 207. Section 203 provides for original jurisdiction of the federal district courts for actions arising under the Convention. However, it does not eliminate either explicitly or by implication the Chapter 1 jurisdiction asserted by Lander. Lander's jurisdictional statement was styled to reflect this combined approach. Nothing in the Convention or the rules of pleading prohibits it.

district court, that although Lander takes the position now that the Arbitral Award is covered by the New York Convention, Chapter 2 of the FAA, other allegations in Lander's Petition to Confirm suggest that if it is unsuccessful under the Convention, it will seek to enforce the award under Chapter 1 of the FAA. Under Chapter 1, failure to move to vacate an arbitration award forfeits the right to oppose its enforcement if sought later by the other party. In contrast, Chapter 2 contains no provision for seeking to vacate an award, although it contemplates the possibility of the awards being set aside in a proceeding under local law, Art. V(1)(e), 21 U.S.T. at 2520, and recognizes defenses to the enforcement of an award.

MMP asked the district judge to defer ruling on its motion to vacate under Chapter 1 of the FAA until the judge decided whether the New York Convention was applicable. Lander vigorously opposed MMP's motion to dismiss and the contention that the New York Convention did not apply here. Without any other filings or oral argument, the district judge ruled on the motions. He held that the New York Convention did not apply, and went on to dismiss the suit for want of federal jurisdiction, without mention of Chapter 1 of the FAA. See 927 F.Supp. 1078 (N.D.Ill. 1996). The decision is reprinted in Appendix pages 13 to 21.

Lander appealed. The Seventh Circuit reversed the judgment of the district court with instructions to reinstate Lander's suit. Its opinion is reported, *see* 107 F.3d 476 (7th Cir. 1997), and is reprinted in Appendix pages 1 to 11.

ARGUMENT

I. THE COURT SHOULD NOT ENDORSE A BELATED CHALLENGE TO VENUE CONTRARY TO THE GOALS OF ARBITRATION AS QUICK AND CHEAP COMMERCIAL DISPUTE RESOLUTION

A. As MMP Failed to Seasonably Challenge Venue For Enforcement of Arbitration Award, This Court Should Deny the Petition for Writ of Certiorari

MMP has waived venue objections by failing to urge them below. MMP did not timely assert F.R.C.P. 12(b)(3), and hence waived venue under F.R.C.P. 12(g) & (h), *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1400-1401 (7th Cir. 1993). The record is completely wanting of any challenge to venue in MMP's motions, briefs, and arguments until the subject challenge. Having failed in its other delay tactics, MMP now seeks to further delay enforcement of its bargained-for result by attacking venue. This cannot stand. It is well settled that venue like personal jurisdiction may be waived when a party fails to seasonably assert it. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960) ("Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default.")

B. Enforcement of a New York Arbitration Award In Illinois Advances Twin Goals of Arbitration To Provide Quick and Cheap Resolution

When a party starts and actively prosecutes an arbitration it is bound by the results. Post-award renege

tactics, such as MMP's Petition for Writ of Certiorari challenging venue for the first time before this Court, are not tolerated by the law. They frustrate the goal of arbitration to provide a "quick and cheap" commercial dispute resolution, *Widell v. Wolf*, 43 F.3d 1150, 1151 (7th Cir. 1994), see *also Flexible Manufacturing Systems Pty, Ltd., v. Super Products Corp.*, 1996 WL 304858, *3 (7th Cir. 1996) (holding that it was for the arbitrator to decide who breached the agreement first and what damages to award as a consequence, and imposing sanctions for a frivolous challenge to an arbitral award); *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, at 1203 (7th Cir.1987) ("The *promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation* in the district court followed by groundless appeal to this court; we have said repeatedly that we would *punish such tactics and we mean it.*") [emphasis added]

Chapter 1 of the Act, 9 U.S.C. § 1 *et seq.*, establishes a "federal policy favoring arbitration." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). MMP voluntarily entered into an arbitration agreement with Lander, requested arbitration in New York and lost on counterclaims. Given the well-settled federal policy favoring arbitration as a quick and cheap mechanism for dispute resolution, MMP's latest delay tactic should not be entertained by this Court.

Simply put, Lander's award made in New York, is enforceable in Illinois, MMP's residence. A Federal court may hear this action under 28 U.S.C. § 1331, Title 9 federal question, and/or 28 U.S.C. § 1332, diversity of

citizenship and 9 U.S.C. § 9. MMP's latest delay tactic by way of the subject Petition has demonstrably wasted time and money; by the time this matter will be heard the award will likely reach its second anniversary.

The venue for bringing the confirmation of a New York award in Illinois is permissive under 9 U.S.C. § 9. *Merril Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 329 (7th Cir. 1995); *In re VMS Securities Litigation*, 21 F.3d 139, 144-45 (7th Cir. 1994); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *Motion Picture Lab Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18-19 (2nd Cir. 1986). *VMS* reaffirmed the leading case *NII Metals Services, Inc. v. ICM Steel Corp.*, 514 F.Supp. 164 (N.D. Ill. 1981), holding that a federal court which otherwise has jurisdiction over the parties may confirm an arbitral award made within a different district. *NII* involved an Illinois contract claim against ICM, who successfully invoked the arbitration clause contained in the parties' agreement. After NII prevailed at the arbitration hearings in New York, it moved for enforcement under § 9 in the Northern District of Illinois. ICM resisted on the grounds that § 9 limits jurisdiction for confirmation to the United States District Court for the Southern District of New York, where the arbitration was held. It lost, as should MMP's argument.

MMP's belated position stymies the purposes of the FAA. This Court has deemed the "statutory policy" of the Act to be "rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 23 (1983). Denying jurisdiction or restricting venue here without any mandate or reason to do so thwarts this policy. *See, VMS*, 21 F.3d at 145. As

fully established above, Lander is entitled to enforcement of its bargained-for award under 9 U.S.C. § 9. For these reasons, this Court should not hear MMP on its belated venue challenge.

II. AMERICAN-MADE ARBITRAL AWARDS MUST BE ENFORCED HERE UNDER THE NEW YORK CONVENTION AS THIS IS CLEARLY CONTEMPLATED BY THE PURPOSE OF THE CONVENTION, ITS IMPLEMENTING LEGISLATION, AND THE PRECEDENT

Article I(1) of the Convention mandates confirmation and enforcement of non-domestic arbitral awards. Chapter 2 of the FAA, 9 U.S.C. § 201 *et seq.*, implementing the Convention, defines "non-domestic" as an arbitral award arising out of a relationship which envisages a performance abroad between U.S. citizens and provides that such non-domestic awards fall under the Convention. To the extent the U.S. accession declaration under Article I(3) limits the enforcement of arbitral awards, it does so on the basis of reciprocity. That is, the accession declaration encourages recognition of the awards made within a Contracting State to the Convention. Accordingly, the award made in the United States, a Contracting State, based on the parties' transactions in Poland, clearly falls under the Convention.

A. History, Text, and Purpose of the Convention Mandate Interpretation of Non-Domestic Awards To Include Performance Abroad under 9 U.S.C. § 202

The Second Circuit explored the purpose and history of the Convention in *Bergesen v. Joseph Miller Corp.*, 710

F.2d 928 (2d Cir. 1983) (holding that an arbitral award obtained in New York involving two foreign entities falls under the Convention). *See also, Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357, 1363 (9th Cir.1989), *cert. denied*, 494 U.S. 1016 (1990) (holding that the Iran-U.S.A. Claims Tribunal awards were enforceable under the Convention).

In New York in 1958, the United Nations facilitated the creation of an international agreement, the Convention or the New York Convention, providing for enforcement of foreign arbitral awards. Party-States to the Convention agreed to recognize arbitral awards as binding and enforce them in accordance with their own rules of procedure. *Id.* 887 F.2d at 1362 *citing* to Article III of the Convention. The Convention reflects the efforts of businesses involved in international trade to provide a workable mechanism for the swift resolution of their day-to-day disputes. International merchants often prefer arbitration over litigation because it is faster, less expensive, private and more flexible. *Bergesen*, 710 F.2d at 929.

The United States attended and participated in the 1958 conference, but did not sign the Convention. Ten years later, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation. There was no opposition to the proposed legislation, H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, *reprinted* in 1970 U.S.Code Cong. & Ad.News 3601, 3602, which became 9 U.S.C. §§ 201-208 (1976). *Bergesen*, at 929. *See also, Gould*, 887 F.2d at 1362; *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993) (reversing a dismissal for lack of

subject matter jurisdiction where petitioner made out a *prima facie* claim under the Convention).

Article I(1) of the Convention provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic* awards in the State where their recognition and enforcement are sought. [emphasis added]

In acceding to the Convention, the United States made a declaration under Article I(3) of the Convention, 9 U.S.C. § 201, *see also, Bergesen*, 710 F.2d at 932-933 (*citing* Presidential Proclamation 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970)), reprinted at notes following 9 U.S.C. § 201:

> The United States will apply the Convention, *on the basis of reciprocity,* to the recognition and enforcement of only those awards made in the territory of *another* Contracting State. [emphasis added]

The implementing legislation Section 202 of Title 9 U.S.C., which is entitled "Agreement or award falling under the Convention," in turn provides:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention *unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other*

> *reasonable relation with one or more foreign states.* [Emphasis added]

Focusing these rules on the subject case means the Convention applies to any arbitral award made within the territory of a Contracting State, including the United States, involving commercial transactions between U.S. citizens abroad.

B. Territorial Principle Embodied in Article I(3) Focuses on Reciprocity of Signatories Not On Awards Made in Different Contracting States

This Court as well as the Second, the Ninth, the Fifth, the Seventh, and the First Circuits focuses on the point which MMP has missed. The adoption of the declaration does not give rise to a narrow interpretation of the Convention.[2] *Bergesen*, 710 F.2d at 933. Rather, the Convention

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[2] To the extent there is an ambiguity, if any, the 1972 implementing legislation clarifies the 1970 accession declaration. It is well settled that a later enactment supersedes a prior Treaty. *Edye v. Robertson*, 112 U.S. 580, 599 (1885) ("so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal"); *Tag v. Rogers*, 267 F.2d 664, 667-668 (D.C.Cir. 1959) (Mr. Justice Burton, retired), *cert. denied*, 362 U.S. 904 (1960) (holding the treaties and statutes are on the same level and, thus the latest action expresses the controlling law):

> Once a policy has been declared in a treaty or statute, it is the *duty* of the federal courts to accept as law *the latest expression* of policy made by the constitutionally authorized policy-making authority . . . When, . . . a constitutional agency adopts a policy contrary to a

should be interpreted broadly to effectuate its purpose. *Bergesen*, 710 F.2d at 933; *Cargill*, 991 F.2d at 1018; both citing to *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n. 15 (1974), *rehearing denied*, 419 U.S. 885 (1974), and other cases.

This Court has taught the intended purpose of the Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, *Scherk*, 417 U.S. at 520 n. 15 (an international commercial agreement to arbitrate a dispute under the ICC Court rules in Paris, France, should be respected and enforced by the U.S. courts despite alleged violations of U.S. securities laws):

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was *to encourage the recognition and enforcement of commercial arbitration agreements in international contracts* and to unify the standards by which agreements to arbitrate are observed and *arbitral awards are enforced in the signatory countries. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961). [emphasis added]

The Second Circuit applied that purpose in *Bergesen*, 710 F.2d at 933, and held that Congress spelled out the

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trend in international law or to a treaty or prior statute, the *courts must accept the latest act* of that agency. [emphasis added]

definition of what constitutes a non-domestic award under Article I(1) in the implementing legislation embodied in 9 U.S.C. § 202:

> The legislative history of this provision [9 U.S.C. § 202] indicates that it was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless *it has a reasonable relation with a foreign state.*" H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S.Code Cong. & Ad.News 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered *nondomestic*, see *Pisar* at 18, *Congress spelled out its definition of that concept in section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not.* See *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp. 737, 741 (S.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw.U.L.Rev. 1, 16 (1971) (Under implementing legislation Convention should apply when foreign contacts are substantial, i.e., "where a foreign person or corporation is a party to an agreement involving foreign performance, *or where the business deal has some other 'reasonable relation with one or more foreign states.'* "); *see also* McMahon at 740-43. [emphasis added]

The Ninth Circuit applied the same purpose in *Gould*, 887 F.2d at 1362. Construing the territorial provision of Article I(3), *Gould*, at 1362, held that jurisdictional requirements under the Convention are satisfied for an award issued in The Hague, Netherlands, because Netherlands is a Contracting state:

> The United States imposes an additional related condition on the award: it must be *"made in the territory of another Contracting State"*, 21 U.S.T. 2566, reprinted at notes following 9 U.S.C.A. Sec. 201. Because of the "shall apply" language of Article I, *we read these requirements into the jurisdictional* mandate of section 203.
>
> The Tribunal's award satisfies these requirements as well. That is, the Tribunal sits at The Hague, which is in the Netherlands, *which is a contracting State*. In addition, the award is obviously not domestic in nature because Iran is one of the parties to the agreement. [emphasis added]

The Fifth Circuit explained Congress' purpose in adopting the Article I(3) declaration in *National Iranian Oil Co. (NIOC) v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987). Upholding an agreement between Iranian and U.S. companies to hold arbitration in Iran, *NIOC*, at 335, held that concerned with reciprocity, Congress' purpose in adopting the Article I(3) declaration was to allow signatory States to reap the benefits of the Convention, and thus to give further incentives to non-signatory States to join:

> When the United States adhered to the Convention, it expressly chose the option available in Article I(3), to "apply the Convention, on the

> basis of reciprocity, to the recognition and enforcement of *only* those awards made in the territory of another Contracting State." Declaration (emphasis added). While the House and Senate Committee reports do not inform us as to the purpose of adopting this reservation, *its purpose seems obvious*. Concerned with *reciprocity*, Congress must have meant only to allow *signatories to partake of the Convention's benefits* in U.S. courts and thus to give further *incentives* to non-signatory nations to adhere to the Convention. [emphasis added]

See also, E.A.S.T., Inc. of Stamford, Connecticut v. M/V Alaia, 876 F.2d 1168, 1172 (5th Cir. 1989) (holding an agreement involving a party from a non-signatory State falls under the Convention since the agreement provides that arbitration will occur within a signatory State):

> The principle of reciprocity is thus concerned with the forum in which the arbitration will occur and *whether that forum state is a signatory to the convention* – not whether both parties to the dispute are nationals of signatory states. *La Societe Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Shaheen Natural Resources, Inc.*, 585 F.Supp 57, 64 (S.D.N.Y. 1983), *affirmed on basis of district court opinion*, 733 F.2d 260 (2d Cir. 1984), *cert. denied*, 469 U.S. 883 (1984). [emphasis added]

The First Circuit dealt with the scope of the Convention and the U.S. declaration under the Article I(3) in the context of jurisdictional analysis involving a request for arbitration. *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-187 (1st Cir. 1982), construed the Convention Articles I(1) and

I(3) to ask whether the agreement provides for arbitration "in the territory of a signatory of the Convention," affirmed a dismissal based on an agreement to arbitrate a dispute in Italy, a signatory of the Convention, and set out the following test:

> (1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles II(1), II(2).
>
> (2) Does the agreement provide for arbitration *in the territory of a signatory of the Convention? Convention, Article I(1), I(3)*; 9 U.S.C. § 206; *Declaration of the United States upon accession*, . . . 9 U.S.C.A. at 154 n.29 (1982 Supp.)
>
> (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202.
>
> (4) Is a party to the agreement not an American citizen *or does the commercial relationship have some reasonable relation with one or more foreign states*? 9 U.S.C. § 202. [emphasis added, parallel citations omitted]

See also, Sedco v. Petroleos Mexicanos Mexican National Oil Co. (Pemex), 767 F.2d 1140, 1144-1145 (5th Cir. 1985); *Tennessee Imports, Inc. v. Filippi*, 745 F.Supp. 1314, 1321-1322 (M.D. Tenn. 1990); *Corcoran v. Ardra Insurance Co., Ltd.*, 657 F.Supp. 1223, 1227 (S.D.N.Y. 1987), appeal dismissed, 842 F.2d 31 (2nd Cir. 1988), all applying the *Ledee* test. See

also, *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Pa. 1976).[3]

The cited precedent magnifies the point missed by MMP. The avowed purpose of the Convention to encourage the recognition and enforcement of international commercial arbitration agreements is met by enforcing in the United States, the American-made arbitral award involving transactions in Poland between U.S. citizens. As the United States is a signatory to the Convention, the awards made in its territory, for its citizens, may not be excluded from the Convention. Any other result plainly contradicts the implementing legislation embodied in 9 U.S.C. § 202. *Cf., Scherk*, 417 U.S. at 520 n. 15: "Congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 *et seq.*, in order to implement the Convention. Section 1 of the new chapter, 9 U.S.C. § 201, provides *unequivocally* that the Convention 'shall be enforced in United States courts in accordance with this chapter.' " [emphasis added]

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[3] A request to commence arbitration springs from the same well as the right to enforce the resulting arbitral award, *i.e.* the parties' agreement to arbitrate. An unconfirmed award is a contract right which may be used as the basis for a cause of action. A request to commence arbitration runs from the arbitration clause in a contract. An action to confirm an arbitral award after a losing party reneges (as here) runs from the identical arbitration clause in the contract. Moreover, a request for arbitration carries no force without enforcement. By definition, a contract is an enforceable promise, and thus there can be no valid contract without meaningful enforcement.

The interpretation of Section 202 as urged by MMP is impermissibly narrow. Manifestly, many global companies take advantage of arbitration to resolve international commercial disputes within the territory of the United States. To hold, as MMP asks here, that these companies must go elsewhere to enforce American-made awards is inefficient and limits the choices available for enforcement. Indeed, MMP's reasoning places the purpose of the Convention on the horns of a dilemma. Under one choice, Lander would have to confirm the award in Poland, or Canada, or France, or anywhere but the United States to fall under the Convention. Since MMP probably has no assets in any of these States, Lander would have to get a foreign judgment under the Convention, say in Poland (a signatory to the *Convention*) which would then have to be recognized in the U.S. courts through an additional mechanism for recognition of foreign judgments. This undoubtedly means further delay and additional costs: the very results which the Convention and its implementing Chapter 2 of the FAA work hard to avoid. Under another choice, Lander would have to specify a non-U.S. forum to conduct the arbitration so as to obtain the benefits of U.S. courts for enforcement of the award under the Convention. Manifestly, this option is especially unfair to U.S. citizens, since it forces them to arbitrate abroad to take advantage of home court during enforcement. Again, this spawns costly delays.

C. MMP May Not Have the New York Convention construed for U.S. Citizens as a Limitation Wrapped in a Restriction Inside a Qualification

MMP argues that because the award was made in New York it cannot be enforced in the United States, and that the Article I(3) declaration when read with Article I(1), is conclusive that the award here is not covered by the Convention. That is, while Article I(1) clearly provides that non-domestic awards fall under the Convention, MMP claims that Article I(3) excludes confirmation in the territory where the award was made. Thus, MMP asserts that as the implementing legislation in 9 U.S.C. 202 does not define "non-domestic" awards set forth in Article I(1), U.S. citizens are limited to confirming only foreign made awards under the Convention.

The meaning of the word "another" is ambiguous in Article I(3), as modifying the "Contracting State." MMP relies on this ambiguity and hangs its entire argument on the one interpretation of the word "another" which runs afoul of the purpose of the Convention as taught by this Court. The word "another"[4] could mean either "additional, similar" or "different." MMP imputes the latter

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[4] *See e.g. The Random House Dictionary of English Language* 85 (2d Ed. 1987), defining "another" as:

> 1. being one more or more of the same; further; additional: *another piece of cake.* 2. different; distinct; of a different period, place or kind: *at another time; another man.* 3. very similar to; of the same kind or category as: *What we need today is another Thomas Jefferson.* 4. one more; an additional one: *That first hot dog tasted so good I'd like another.* 5. a different one; something different: *going from one house to another.* 6. one like the first: one copy for her and another for

meaning to "another." It urges that in the subject case the Convention only applies to those awards made *outside* the United States. Such reading squarely contradicts the *principal purpose* underlying American adoption and implementation of the Convention. *See, Scherk,* 417 U.S. at 520 n. 15, *supra.*

MMP would have the Convention construed for U.S. citizens as a limitation wrapped in a restriction inside a qualification. This cannot stand. Obstructing the enforcement in the United States of American-made awards involving transactions abroad discourages the mandated recognition and enforcement of commercial arbitral agreements in international contracts.[5] That the restriction invites expense, delay, and inefficiency into the arbitration system is also at odds with the purpose. Informed by the clear purpose of the Convention, "another" in Article I(3) must mean "additional" or "similar", *not* "different." Indeed, MMP concedes this critical point because its Petition is silent on the issue of Convention's purpose. *PepsiCo, Inc. v. Redmond,* 54 F.3d 1262, 1271 (7th Cir. 1995)

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him. 7. a person other than oneself or the one specified: *He told her he loved another.* [emphasis in original]

See also, The Oxford English Dictionary (2d Ed. 1961); *Webster's Ninth New Collegiate Dictionary* (9th Ed. 1983).

[5] *Cf., Scherk,* at 516-517: "A parochial refusal by the courts of one country to *enforce* an international arbitration agreement would not only *frustrate* these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." [emphasis added] That MMP is jockeying after it lost the arbitration it started aggravates the situation.

("silence on the issue in its . . . brief indicates that it concedes the point").

MMP's disregard for the purpose of the statute clearly conflicts with this Court's instruction that where the language of the statute (or treaty) is ambiguous its purpose informs the meaning. *See, e.g., United States v. Bacto-Undisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' ", *quoting SEC v. Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953)). The context of the purpose and the Article I(3) language as to reciprocity, establish that "another" deals with reciprocity, *i.e.* the "additional" meaning of the word. That is, concerned with reciprocity, Congress' purpose in adopting the Article I(3) declaration was to allow signatory States to reap the benefits of the Convention, and thus to give further incentives to non-signatory States to join. *NIOC*, 817 F.2d 326. As the United States is a signatory, the New York arbitral award here falls under the Convention.

The Convention itself excludes MMP's reading. Thus, in the first sentence of Article I(1), the "territorial" restriction as to the awards as urged by MMP is expressed as "awards made in *the territory of a State other than the State where the recognition and enforcement of such awards are sought*. [emphasis added]." In contrast, Article I(3) uses "awards made only in the territory of *another* Contracting State. [emphasis added]." Manifestly, had the drafters of the Article I(3) meant to assign the meaning urged by MMP, they would have used the same language as that appearing in the first sentence of Article I. The fact they did not is a strong indication of the "additional" meaning which further defeats MMP's interpretation.

D. Informed by its Purpose, the Convention, Its Implementing Statute 9 U.S.C. § 202, and the Precedent, Are in Harmony

Article I(3) and the implementing legislation of 9 U.S.C. § 202 should be read together rather than one to the exclusion of the other. Article I(1) and the purpose of the Convention must also be considered in the calculus. And all of these provisions must be read together – without conflict, and as they have been interpreted by the courts. *See e.g., Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982). In this way, all material meanings agree and the words mean what they say. Article I(1) means non-domestic awards fall under the Convention. Article I(3) means The United States will recognize and enforce awards made in any Contracting State, including itself. The precedent, as illustrated by *Bergesen*, 710 F.2d at 933, *Ledee*, 684 F.2d at 186-187, *NIOC*, 817 F.2d at 335, and others cited *supra*, means the courts uphold agreements to arbitrate in international contexts, and recognize and enforce arbitral awards under the Convention on the basis of reciprocity. The purpose of the Convention is fulfilled, when *more* non-domestic awards are recognized and enforced rather than *less*. Such inclusive, consistent reading erases MMP's position.

Simply put, MMP's unwarranted restrictions of the New York Convention for U.S. citizens are trumped by the inclusive reading of its terms, its implementing legislation, and clear precedent. MMP may not avoid this bargained-for result by arguing that courts or Congress overrule international law. This diversion fails.

MMP similarly fails in its characterization of the clear precedent weighing against its position. By way of example, at page 17 of its Petition it attempts to spin the holding of *Gould*, 887 F.2d 1357, citing it for the proposition that Article I(3) must be read together with Article I(1). However, MMP omits the next paragraph in *Gould*, at 1362, which explains both the effect and the reasoning of this inclusive reading: jurisdictional requirements under the Convention are satisfied for an award issued in The Hague, Netherlands, *because* Netherlands is a Contracting state. Finally, MMP has no response to the teaching and holding in *Ledee*, 684 F.2d at 186-187, and the many cases which followed it.[6] Again, under *PepsiCo*, 54 F.3d at 1271, MMP's silence concedes that reciprocity controls the meaning of "another."

III. A PARTY, WHO AGREES TO BINDING ARBITRATION, THEN COMMENCES ARBITRATION UNDER THE TERMS OF THE AGREEMENT AND LOSES ON COUNTERCLAIMS HAS WAIVED ALL JURISDICTIONAL OBJECTIONS TO THE OTHER PARTY'S RIGHT TO JUDICIAL RELIEF TO ENFORCE THE ARBITRAL AWARD

MMP commenced this arbitration in accord with its agreements with Lander. The agreements provided that the arbitration would be *binding*.

By commencing the arbitration and contesting it fully to an arbitral award, MMP has waived all jurisdictional

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[6] Instead, it focuses on a proposed interpretation of what makes a New York award non-domestic by a Dutch lawyer (see Petition at 19).

objections to Lander's right to judicial relief to enforce the arbitral award.

This cannot be more eloquently expressed than was done by Chief Judge Posner in *Lander* at 107 F.3d 480:

> To agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award. Were there a rule that no one could be ordered by a court to pay an arbitration award unless he agreed to submit himself to the court's jurisdiction, the signing of the agreement to *binding* arbitration would be a waiver of the rule. To invoke arbitration pursuant to such an agreement, as MMP also did, is further to agree to be bound, if necessary through court action, by the arbitrator's award, provided, of course, that the award does not have any infirmity of a sort that a court can use to invalidate an arbitration award. Imagine MMP's indignation if it had won the arbitration and Lander had denied that any court in the United States had jurisdiction to enforce the award (Emphasis present)

CONCLUSION

For the foregoing reasons, this Court should deny MMP's Petition for Writ of Certiorari.

Respectfully submitted,

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FILED
JUL 25 1997
CLERK

No. 96-1844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MMP INVESTMENTS, INC.,

Petitioner,

v.

LANDER CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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I. RESPONDENT DOES NOT CHALLENGE THAT THERE IS A SPLIT IN THE CIRCUITS ON WHETHER ARBITRATION AWARDS MUST BE CONFIRMED IN THE DISTRICT IN WHICH THE AWARD WAS ENTERED.

A. Respondent Nowhere Contests That A Split Of The Circuits Exist.

Eight years ago the Ninth Circuit recognized the existence of a "split of authority among the circuits as to whether section 9's venue provision is mandatory." *Sunshine Beauty Supplies, Inv. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989). This split is certainly long-standing enough to warrant Supreme Court review.

Here it is undisputed that, while the arbitration award was *made* in New York, Respondent sought to confirm that arbitration award in the Northern District of Illinois. (App. at 7). Respondent concedes this point. (Respondent Br. at 8). Under decisions from the Third, Fifth, Sixth, Eighth and Ninth Circuits, Respondent would find venue *improper* in the Northern District of Illinois to confirm an arbitration award made in New York because those Circuits hold that the language of § 9 is deemed "mandatory." (*See,* Petition at 12-13). On the other hand, the Seventh Circuit expressly permits venue to lie in a district *other than* where the arbitration was made. *See In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994).[1] Respondent's failure to address, much less explain, the differing interpretations among the Circuits should be construed as a concession that confusion exists on this important issue of federal venue. (Respon-

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[1] The Seventh Circuit opinion below expressly acknowledges the existence of the split of authority on this very issue, unabashedly stating that its interpretation of § 9 is directly "contrary" to the Ninth Circuit's reading of the same statutory provision. (App. at 8).

dent's Br. at 22); *see also PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1277 (7th Cir. 1995).

Respondent reinforces the need for Supreme Court guidance by limiting its analysis to cases holding that venue under § 9 is permissive, while completely ignoring the wide array of precedent that limits venue under § 9 to the district where the arbitration award was made—in this case, concededly New York. (Respondent's Br. at 9; *compare,* MMP Petition at 13-15). The Seventh Circuit's decision has dealt one more blow to certainty and predictability on the issue of venue under § 9. By accepting MMP's Petition, this Court can settle authoritatively this deepening split among the Circuits, and thereby clarify when venue is proper in actions confirming arbitration awards brought under the FAA.

B. MMP Did Not Waive The Issue Of Venue Under § 9 Of The Federal Arbitration Act.

Unable to dispute the direct conflict among the Circuits in interpreting § 9's venue provisions, Respondent tries to minimize the significance of the question presented by suggesting that MMP waived the issue by not having challenged venue. (Respondent's Br. at 7). This argument is incorrect for at least two fundamental reasons.

First, MMP did not file a motion under the FAA challenging venue because it was *Respondent's* consistent position in the district court that it was seeking to enforce the arbitration award *under the Convention.* Respondent's Petition to Confirm the arbitration award bore this out, stating that "[t]his proceeding arises under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under chapter 2 of Title 9, United States Code, *and particularly Section 207.*" (emphasis added) (Respon-

dent's Petition, ¶ 4). Title 9 U.S.C. § 207 sets forth the standard for enforcing awards under the Convention, not the FAA. Nor did Respondent, in opposing MMP's motion to dismiss before the district court, assert that it had a right to confirm the arbitration award *by virtue of the FAA*. Rather, Respondent steadfastly maintained that this proceeding arose under the Convention. Even the district court was under the impression that the *sole* jurisdictional ground being asserted to confirm the award was the Convention, and not the FAA. (App. at 13, n.1). In its brief before the Seventh Circuit, MMP reiterated its position that Respondent failed to present to the district court any argument entitling Respondent to relief under the FAA. (*See* MMP Seventh Circuit Brief at 19-22).

As Respondent never argues to the district court that the FAA provided a basis to confirm the arbitration award, MMP's failure to challenge venue under § 9 at the outset of the confirmation proceedings can hardly be considered a "waiver" of whether venue was proper. Respondent's hue and cry that MMP is now trying to use the § 9 venue provision as a delaying tactic is belied by the fact that *Respondent* never affirmatively relied upon the FAA before the district court as a ground to confirm the arbitration award. Instead, Respondent raised the FAA as an alternative ground of confirmation only after it lost in the district court and found itself on appeal in the Seventh Circuit.[2]

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[2] In fact, the Seventh Circuit's opinion confirmed that MMP sought to have the FAA issues (which necessarily included the venue question under that Act) *deferred* pending a ruling on whether the Convention empowered the district court to confirm the arbitration award. (*See* App. at 3: "MMP asked the district judge to defer ruling on its motion to vacate [the arbitration award under the FAA] until the judge decided whether the New York Convention was applicable.").

Second, to find that MMP somehow elected to "waive" the right to challenge venue under § 9 of the FAA would be fundamentally unfair considering that the Seventh Circuit's opinion in one fell swoop disposed of the venue issue in the following sequential fashion: (a) raising the § 9 venue issue *sua sponte* in its opinion *without the parties ever having had the opportunity to even brief the issue*, (b) acknowledging the split of authority among the Circuits on whether § 9 provides for permissive or mandatory venue, and (c) concluding its analysis by rejecting outright the Ninth Circuit's reading of § 9 in *Sunshine Beauty Supplies*. (App. at 8). Apparently, the Seventh Circuit ruled on the § 9 venue issue to prevent MMP from raising that issue upon remand. Depriving a party of the opportunity to respond to venue issues *before* a court rules on them has generally been condemned. *See, e.g., Lipofsky v. New York State Workers Compensation Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988); *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986).

In short, MMP is entitled to challenge the § 9 venue issue in this court because: (1) Respondent urged the applicability of the FAA before the district court as a ground to confirm the arbitration award for the first time in its appeal *after* the district court rejected its Petition brought under the Convention; and (2) the Seventh Circuit *sua sponte* raised and rejected the § 9 exclusive venue issue in a single gesture without first affording MMP the opportunity to contest the issue on appeal. This Court is not only a proper forum to raise the venue issue, it is likely the *only* forum that can now address that very question.

II. RESPONDENT'S FAILURE TO CITE A SINGLE CASE SUPPORTING FEDERAL JURISDICTION UNDER THE CONVENTION IN A DOMESTIC DISPUTE FORTIFIES THE NEED FOR SUPREME COURT REVIEW.

The second question presented in MMP's Petition strikes at the heart of federal jurisdiction: whether the Convention empowers federal courts to confirm arbitration awards despite their possessing all of the following purely *domestic* attributes: (a) an arbitration agreement entered into exclusively between United States citizens in the United States; (b) an arbitration award made in the United States; and (c) an arbitration agreement governed exclusively by United States internal law. The district court understandably said "no," finding that the Convention should not be expanded "to include an award *between United States' parties issued in the United States*." (App. at 20) (emphasis added). In reversing, the Seventh Circuit has established an unprecedented basis of federal jurisdiction—one that can find no support in caselaw from this Court, nor in the legislative history of the Convention. Indeed, even the district court acknowledged that "this case [is] one of first impression." (App. at 16). Nothing in the Seventh Circuit's opinion detracts from that finding. (App. at *e.g.*, 9-11). Even Respondent acknowledges that the Convention's language is ambiguous. (Respondent's Br. at 23). The Seventh Circuit has expanded federal jurisdiction under the Convention to embrace any commercial dispute (regardless of the amount in controversy (9 U.S.C. § 203)) exclusively between U.S. citizens that happens to include partial performance of their agreement in a foreign country. This unduly focuses on the *situs* of the parties' performance, rather than the *differing nationalities* of the disputants.

Respondent expends nearly 15 pages of its opposition brief attempting to explain why the New York Convention must apply to this domestic commercial dispute. Cases from

various Circuits are offered as support for Respondent's position that the Convention confers wide-ranging federal jurisdiction. (Respondent's Br. at 10-18). Respondent further resorts to parsing the language of the Convention in the hope of persuading this Court that the Seventh Circuit was right in interpreting the Convention to include domestic disputes. (Respondent's Br. at 21-22). Indeed, Respondent's lengthy discussion of the Convention seems more like a brief on the merits after a petition for writ of certiorari has been granted, than an opposition brief in the first instance.

But conspicuously absent from Respondent's exposition is a single case—from this Court or any other Circuit—that has expanded the Convention in a manner even remotely similar to that which is now binding law throughout the Seventh Circuit. Until now, no federal court held that the Convention conferred federal jurisdiction to confirm an arbitration award exclusively between United States citizens, where the parties' arbitration agreement was made in the United States and governed solely by United States law. Such a lack of precedent, though, is hardly fortuitous, given that the Convention, when read along with the United States' Declaration of Accession, has long been construed as *excluding* enforcement of arbitration awards *made in the same country in which the award was entered*—which is precisely what happened here. *See* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 64 (1985) ("The New York Convention applies in the first place to arbitration awards which are *made in the territory of another Contracting State.*") (emphasis added) (*see also* App. at 20). This Court has acknowledged the importance of the United States' Declaration, treading carefully so as to avoid "subverting" its intent. *See, e.g., Mitsu-*

bishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n.21 (1985) ("But we decline to subvert the spirit of the United States' accession to the Convention. . . ."). The absence of a single federal decision interpreting the Convention since its ratification in the fashion adopted by the Seventh Circuit lends added weight to the necessity for Supreme Court review. The course of conduct of party signatories to a treaty must be accorded considerable respect in divining the true intent ascribed to an international agreement. *See, e.g., O'Connor v. United States*, 479 U.S. 27, 33 (1986).[3]

While Respondent relies heavily on the decision in *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983), and claims that MMP has "no response to the teachings and holding" in *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) (Respondent's Br. at 25), neither case supports the Seventh Circuit's interpretation of the Convention. In both *Bergesen* and *Ledee*, none of the parties seeking to enforce arbitration was a United States citizen; none of the arbitration agreements was executed in the United States, nor governed by United States law. Conversely, in each of the cases cited by Respondent, at least one of the parties to the arbitration agreement was a citizen of a country *other than the United States*, so as to justify invocation of the Convention's enforcement mechanism. For this reason, the string-cited cases cited by Respondent that it asserts as "applying the *Ledee* test" are entirely unpersuasive. (Respondent Br. at 18). Recent district court decisions confirm MMP's position that the Convention was designed only to apply when parties of nation-

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[3] *See also Zicherman v. Korean Air Lines Co.*, ___ U.S. ___, 116 S. Ct. 629, 634 (1996) (aid in interpreting treaty includes "post ratification understanding of the contracting parties").

alities *other than exclusively the United States* are involved.[4]

If allowed to stand, the Seventh Circuit's expansion of the Convention threatens to proliferate litigation in federal courts by freely permitting parties to seek confirmation of otherwise run-of-the-mill commercial disputes that arise solely between United States' citizens, based on agreements made entirely in the United States and controlled exclusively by United States law. This Court, however, has held that the Convention's goal is limited to the recognition and enforcement of "*international* contracts." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322, 2329 (1995) (emphasis added). It makes no sense to have an international treaty with 105 national signatories govern commercial disputes *exclusively between United States citizens*. Until the Seventh Circuit's holding, no federal decision had ever stretched the Convention that far.

Respondent concedes that the purpose of the Convention is limited to "international commercial arbitration agreements." (Resp. Br. at 19). Supreme Court review has now become crucial to restore the Convention to that limited role designed as a mechanism to settle disputes between "international", as distinguished from purely domestic, merchants. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.15 (1974).

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[4] *See, e.g., Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Segoro*, No. 96 CIV 2301 (KMW), 1997 WL 278054, at *4 (S.D.N.Y. May 23, 1997) ("The purpose of the New York Convention was to effectuate arbitration proceedings and their enforcement *between companies of different nationalities.*") (emphasis added).

III. BY SUBMITTING TO ARBITRATION MMP DID NOT WAIVE ITS RIGHT TO CONTEST FEDERAL JURISDICTION UNDER THE CONVENTION.

According to Respondent, by agreeing to arbitration, "MMP has waived all jurisdictional objections to [Respondent's] right to judicial relief to enforce the arbitral award." (Respondent's Br. at 25-26). Respondent is plainly wrong for two elementary reasons.

First, federal subject matter jurisdiction cannot be "waived" by language contained in a parties' contract. *See, e.g., Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996). In granting MMP's motion, the district court dismissed Respondent's petition on *jurisdictional* grounds. (App. at 14: "*[T]he motion challenges the jurisdictional basis of the petition,* that is, whether this court has the authority to confirm the arbitral award under the Convention.") (emphasis added). Obviously, MMP did not "waive" the right to challenge the jurisdiction of the federal court to confirm the entry of an arbitration award under the Convention simply by entering into an arbitration agreement.

Second, both the Convention, as well as the FAA, expressly provide for limited judicial review of arbitration awards. *See, e.g., Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994); 9 U.S.C. § 11(b); Convention, Article V(1)(c). 9 U.S.C. § 207.

Given that MMP's challenge was that the award did not fall within the Convention's terms, thus rendering the federal court without jurisdiction, Respondent's argument that MMP "waived" the right to contest that jurisdiction by entering into an arbitration agreement should be summarily rejected.

IV. CONCLUSION.

For the reasons stated above and those contained in the petition, MMP respectfully requests that the petition for a writ of certiorari be granted.

Dated: July 25, 1997.

Respectfully submitted,

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